MALAYAN BANKING BHD.

v.

LIM POH HO & ANOR.

COURT OF APPEAL, KUALA LUMPUR
MAHADEV SHANKAR JCA
ABU MANSOR ALI JCA
ABDUL MALEK AHMAD JCA
[CIVIL APPEAL NO: W-04-65-95]
10 JANUARY 1997

LAND LAW: *Charge - Sale of charged property - Duty of chargee - Duty to take reasonable care - Whether to ensure best price possible - Whether to act in good faith*

BANKING: *Securities for advances - Loan agreement - Default in repayment - Sale of charged property - Duty of chargee - Duty to take reasonable care - Whether to ensure best price possible - Whether entitled to take the market as it stood - Whether to act in good faith - Market value of property - Meaning of*

The respondents took a housing loan of RM78,400 from the appellant bank ('the bank') and as security thereof charged the said house to the bank. The respondent defaulted in repayment and had also ignored the various letters of demand sent them by the bank. Pursuant to the terms of the loan agreement executed earlier by the parties, the bank obtained a valuation of the house and thereafter proceeded to sell the same by way of public auction to recover the loan sum. The facts showed that after three public auctions, at which the reserve price of the property had been respectively lowered from RM110,000 to RM100,000 to RM80,000, the bank was still unable to get a bidder for the property. The bank was however successful at the fourth attempt when it lowered the reserve price to RM56,000 and sold the property at that price.

The respondents did nothing to respond to the auctions aforesaid despite advertisements having been put up for the same. As it were, the RM56,000 recovered by the bank was insufficient to meet the respondents' repayment liability under the loan agreement, and this being the case, the bank filed a claim for the balance sum amounting to RM81,021.89. The respondents alleged that the bank was negligent in selling the property at RM56,000, and not at RM100,000, which they contended was the prevailing market value of the property, and so counter-claimed for damages. The learned Judge, acceding to the respondents' argument, dismissed the bank's claim and gave judgment to the respondents for RM44,000.

The bank appealed. Before the learned Judges herein the primary questions that arose were:

(i) whether there was a duty to take care on the part of the bank when it sought to dispose of the property.

(ii) whether the bank was negligent in selling the property at RM56,000.

Held:
Per Mahadev Shankar JCA

[1] Quite apart from the fact that the learned Judge's order was not supported by evidence, the Judge also completely overlooked the fact that the respondents had defaulted in the repayment of their loan which had not been discharged because there was a shortfall for which the respondents were still liable. The alleged damage suffered by the respondents was in fact pleaded by way of a set-off against the claim by the bank for this shortfall still due which stood at RM81,021.89.

[2] *Cuckmere Brick Co. Ltd v. Mutual Finance Ltd* [1971] Ch. 949 is authority for the proposition that, if the chargee decides to sell, he must take reasonable care to obtain a proper price but is no authority for any wider proposition.

[3] A chargee exercising its power of sale could only be held liable for negligence if there was some deliberate and wilful conduct on its part in selling for a lower price. If the power of sale is exercised in good faith for the purpose of protecting his security, then he is not liable to the chargor even though he might obtain a higher price and even though the terms might be regarded as disadvantageous to the chargor.

[4] As for proof of damage it can never be enough for the mortgagor to make a bare assertion that the price was too low even if he calls a valuer to say so because the "true market value" or the "best price" of a property is not what the mortgagor or his valuer thinks it is. The true commercial value of a property is the actual price that property will fetch when it is put up for sale in the open market.

[4a] In the instant case, when there were no bidders at the first three public auctions, all of which were advertised, the only inference possible is that the reserves were too high. At the last auction the reserve was RM56,000. So the only finding possible was that the true market value was RM56,000 because that was all an impartial buyer was prepared to pay for it.

[4b] Any finding to the contrary required positive evidence from the respondents that the auction was fraudulently or so recklessly or negligently conducted that there were genuine buyers who would have come and bid to buy the property at RM100,000 if they had been given an opportunity to do so. No such evidence was called by the Borrowers.

[5] The valuer's report tendered by the respondent's witness was inadmissible because the maker thereof was not called. Consequently the defence allegation of negligence remained only just that, i.e. an unproved assertion of a legal conclusion with no facts to support it.

[5b] The damage, furthermore, had to be proved. Since no person was called to prove that he would have been prepared to pay more than RM56,000 for the property, no damage had been proved by the defence. This being the case, the proper order to make was to allow the bank's claim in full with costs and to dismiss the counterclaim with costs.

[Appeal allowed. Order accordingly.]

*[**Bahasa Malaysia** Translation of Headnotes]*

UNDANG UNDANG TANAH: *Gadaian - Penjualan hartanah yang digadai - Kewajipan pemegang gadaian - Kewajipan untuk berhati-hati dan bertindak dengan munasabah - Samada harus memastikan harga yang sebaik mungkin - Samada harus bertindak dengan sucihati*

PERBANKAN DAN KEWANGAN: *Perjanjian pinjaman - Kemungkiran pembayaran balik - Penjualan hartanah yang digadai - Kewajipan pemegang gadaian - Kewajipan untuk berhati-hati dan bertindak dengan wajar - Samada harus memastikan harga yang sebaik mungkin - Samada berhak untuk menerima pasaran sepertimana adanya - Samada hendaklah bertindak dengan sucihati - Harga pasaran hartanah - Maksud*

Responden telah mengambil satu pinjaman perumahan bernilai sebanyak RM78,400 daripada bank perayu ('bank') dan sebagai jaminannya telah menggadaikan rumah tersebut kepada bank. Responden telah mungkir dalam pembayaran balik dan telah juga tidak menghiraukan beberapa surat tuntutan yang dikirimkan kepada mereka oleh bank. Selaras dengan terma-terma perjanjian pinjaman yang disempurnakan sebelumnya oleh kedua-dua pihak, bank telah mendapatkan satu penilaian bagi rumah tersebut dan selepas itu telah menjualnya melalui perlelongan awam bagi mendapatkan semula jumlah pinjaman. Fakta-fakta menunjukkan bahawa selepas tiga perlelongan awam, di mana harga rizab hartanah tersebut telah masing-masingnya diturunkan daripada RM110,000 kepada RM100,000 kepada RM80,000, bank masih juga tidak berjaya untuk mendapatkan penawar bagi hartanah tersebut. Bank bagaimanapun

berjaya pada percubaan yang keempat bilamana ia menurunkan harga rizab kepada RM56,000 dan menjual hartanah tersebut pada harga itu.

Responden tidak melakukan apa-apa tindakbalas terhadap perlelongan-perlelongan di atas sungguhpun perlelongan tersebut diiklan dengan sepenuhnya. Sepertimana keadaannya, RM56,000 yang diperolehi oleh bank adalah tidak mencukupi untuk memenuhi tanggungan pembayaran balik responden di bawah perjanjian pinjaman, dan oleh hal yang sedemikian, bank telah memfailkan satu tuntutan bagi baki yang perlu dibayar berjumlah sebanyak RM81,021.89. Responden mendakwa bahawa bank adalah cuai dalam menjual hartanah tersebut pada harga RM56,000, dan bukannya RM100,000 yang mereka dakwa adalah nilai pasaran bagi hartanah tersebut ketika itu, dan dengan yang demikian telah menuntut balas untuk mendapatkan gantirugi. Hakim yang bijaksana, menyetujui penghujahan responden, telah menolak tuntutan bank dan memberikan penghakiman kepada responden sebanyak RM44,000.

Bank telah merayu. Di hadapan Hakim yang bijaksana isu-isu utama yang berbangkit adalah:

(i) samada terdapat kewajipan untuk berhati-hati di pihak bank apabila ianya berusaha untuk melupuskan hartanah tersebut.

(ii) samada bank cuai dalam menjual hartanah tersebut pada harga RM56,000

Diputuskan:
Oleh Mahadev Shankar HMR

[1] Selain daripada hakikat bahawa perintah Hakim yang bijaksana telah tidak disokong oleh keterangan, Hakim juga telah tidak menghiraukan hakikat bahawa responden telah mungkir dalam pembayaran balik pinjaman mereka yang masih belum dilepaskan kerana terdapat baki terhadap yang mana responden masih bertanggungan. Gantirugi yang dikatakan dialami oleh responden telah pada hakikatnya diplidkan melalui satu tolakan terhadap tuntutan oleh bank bagi baki yang masih kena dibayar ini, yang mana adalah sebanyak RM81,021.89

[2] *Cuckmere Brick Co. Ltd v. Mutual Finance Ltd.* [1971] Ch. 949 adalah autoriti bagi proposisi bahawa, jika pemegang gadaian membuat keputusan untuk menjual, beliau mesti mengambil perhatian yang wajar bagi mendapatkan harga yang sewajarnya tetapi tidak merupakan autoriti bagi mana-mana proposisi yang lebih luas dari itu.

[3] Pemegang gadaian yang melaksanakan kuasa menjualnya akan hanya boleh dipertanggungjawabkan bagi kecuaian sekiranya terdapat perlakuan yang disengajakan atau tidak jujur dalam menjual bagi satu harga yang lebih rendah. Jika kuasa jualan dilaksanakan dengan sucihati bertujuan

bagi melindungi jaminannya, maka beliau tidak bertanggungan kepada penggadai walaupun beliau mungkin boleh mendapatkan harga yang lebih tinggi and walaupun terma-terma jualan tersebut boleh dianggapkan sebagai tidak menguntungkan penggadai.

[4] Berhubung dengan bukti gantirugi, ianya tidak mungkin akan mencukupi bagi penggadai untuk membuat satu penegasan semata-mata bahawa harga tersebut adalah terlalu rendah walaupun jika beliau memanggil penilai untuk menyatakan sedemikian kerana "harga pasaran sebenar" atau "harga terbaik" sesuatu hartanah bukannya apa yang penggadai atau penilainya fikir. Nilai komersial sebenar sesuatu hartanah adalah harga sebenar yang akan diperolehi oleh hartanah itu apabila ianya dikemukakan untuk jualan dalam pasaran terbuka.

[4a] Dalam kes semasa ini, apabila tidak terdapat penawar pada ketiga-tiga perlelongan awam yang pertama, yang kesemuanya diiklankan, satu-satunya inferens yang wajar adalah bahawa harga-harga rizab adalah terlalu tinggi. Pada perlelongan yang terakhir harga rizabnya adalah RM56,000. Dengan itu satu-satunya keputusan yang wajar adalah bahawa nilai pasaran sebenar adalah sebanyak RM56,000 kerana itulah harga yang sanggup dibayar oleh seseorang pembeli yang saksama.

[4b] Apa-apa keputusan yang bertentangan menghendakkan keterangan yang positif daripada responden bahawa perlelongan itu adalah bersifat fraud atau dikendalikan dengan cuai atau secara melulu dan bahawa terdapatnya pembeli-pembeli tulen yang mungkin akan datang dan membuat tawaran untuk membeli hartanah tersebut pada harga RM100,000 jika mereka telah diberi peluang untuk berbuat demikian. Keterangan yang sedemikian tidak dipanggil oleh peminjam.

[5] Laporan penilai yang dikemukakan oleh saksi responden tidak dapat diterima kerana pembuat laporan tersebut telah tidak dipanggil untuk memberi keterangan. Akibatnya pengataan pembelaan mengenai kecuaian kekal begitu sahaja iaitu hanya merupakan suatu penegasan undang-undang yang tidak terbukti dan tanpa fakta-fakta untuk menyokongnya.

[5b] Gantirugi adalah sesuatu yang harus dibuktikan. Oleh kerana tiada sesiapa yang telah dipanggil untuk membuktikan bahawa beliau sanggup untuk membayar lebih daripada RM56,000 bagi hartanah tersebut, maka tiada gantirugi telah dibuktikan oleh pembelaan. Oleh kerana keadaannya sedemikian, perintah wajar untuk dibuat adalah untuk membenarkan tuntutan bank sepenuhnya dengan kos dan menolak tuntutan balas dengan kos.

[Rayuan dibenarkan. Perintah sehubungan dengannya.]

Cases referred to:

Asia Commercial Finance (M) Bhd. & Anor. v. Development and Realtor Sdn. Bhd. [1992] 2 CLJ 1175 ***(refd)***

Brutan Investment Pty. Ltd. v. Underwriting and Insurance Ltd. and Another [1981-82] 39 ACTR 47 ***(refd)***

Cuckmere Brick Co. Ltd. v. Mutual Finance Ltd. [1971] 1 Ch 949 ***(refd)***

Kian Choon Investments (Pte) Ltd. v. Societe Generale & Anor. [1990] 2 MLJ 74 ***(cit)***

How Seen Ghee v. Development Bank of Singapore [1994] 1 SLR 526 ***(cit)***

Downview Nominees Ltd. v. First City Corporation Ltd. [1993] 1 NZLR 513 ***(foll)***

Other sources referred to:

Halsbury's Law of England, 4th Edn., Vol. 32, para 729

"The Mortgage's Duty on Sale", Peter Butt [1979] 53 ALJ 172

[Appeal from High Court Malaya, Kuala Lumpur; Civil Appeal No: R2-12-370-93]

For the appellant - Abdul Aziz bin Abdul Wahab; M/s. Ariff & Co.
For the respondents - Lee Hock Beng; M/s. H.B. Lee & Co.

JUDGMENT

Mahadev Shankar JCA

The respondents ('the Borrowers') wanted to buy a house in Kota Tinggi ('the said house') from a developer with whom they entered into a sale and purchase agreement dated 11 April 1983. The Borrowers did not have enough money to complete the purchase. So they borrowed RM78,400 ('the loan') from the appellant ('the bank'). The loan was the subject of a loan agreement cum assignment dated 26 January 1985 ('the loan agreement').

The Borrowers insisted on using their own solicitors M/s. Lee, Loo & Bakarudin in the preparation and implementation of the loan agreement, and requested the bank to deal with these solicitors ('the Borrowers' solicitors'). The loan agreement is a formal document which is very comprehensive in its terms. The Borrowers admit they executed the loan agreement and were therefore fully bound by its terms.

By a letter dated 25 February 1985 the Borrowers' solicitors sent the loan agreement and all other collateral documents connected with the loan to the bank. In this letter they stated that they would inform the bank when the loan could be released to the developer which was to be as soon as the Borrowers had paid the differential sum between the sale price and the loan.

By a letter dated 11 May 1985 the Borrowers' solicitors notified the bank that the, differential sum had been paid and requested the bank to release the loan to the developer. By a certificate dated 23 December 1984 the developer's architects had already certified practical completion of the house.

On 7 June 1985 the bank released the loan to the developer, and notified the borrowers it had done so. Under the terms of the loan agreement the borrowers were obliged to repay the loan by monthly instalments of RM1,104 payable before the 10th day of each subsequent calendar month.

What is very evident is that right from the start the borrowers had no intention whatsoever of honouring their commitments to the bank. They defaulted paying every instalment. They ignored the bank's letters of demand. The Bank then sent them a solicitor's notice on 12 October 1995. They ignored that. The bank's solicitors sent another demand letter on 4 November 1985. They ignored that also.

By reason of these defaults which continued unabated throughout the Bank was left no alternative but to resort to its remedies under the loan agreement. Clause 11(3) thereof reads:

> (3) the right and power to sell and assign the said property as the absolute unencumbered owner thereof at such price or prices and in such manner as the bank shall in its absolute discretion think fit free from any interest or otherwise and to apply the proceeds of sale in or towards the satisfaction of the loan and all principal and interest and other moneys due to the bank hereunder and all costs of and occasioned by such sale or sales and the bank shall only pay to the borrowers the balance of the proceeds of such principal and interest and other moneys aforesaid and all the costs of and occasioned by such sale and sales and no assignee or purchaser from the bank shall be concerned to ascertain whether or not any shall default has been actually arisen so as to entitle the bank to exercise its powers of sale or assignment.

Clause 17 thereof reads:

> Clause 17
>
> If the amount realised by the bank on a sale of the said property in pursuance of cl. 11(3) is less than the amount due to the bank the borrowers shall pay to the bank the difference between the amount due and the amount so realised and until payment will also pay interest on such balance at the prescribed rate with yearly rests.

The bank obtained a valuation of the house for RM110,000. It was advertised in the star dated 23 February 1986 for public auction on 26 February 1986. There were no bidders. It was put for auction again on 28 June 1986 at a reserve of RM100,000. Again there were no bidders. Yet again on 17 June 1987 at RM80,000. Again there were no bidders. On 18 March 1988 the bank's valuers by letter advised that the house be put up for further auction at a reserve of RM56,000. This was done by an advertisement in the local newspapers and the house was sold on 21 September 1988 at RM56,000.

Throughout this time the borrowers took absolutely no interest in what was going on. They sat back and let the bank struggle to do what it could to realise its security.

On 4 August 1989 the bank's solicitors sent a demand to the borrowers that the house had been sold for RM56,000 on 21 September 1988 and that the bank required the balance of RM81,021.89 being the deficiency as at 26 July 1989 to be paid with interest in 14 days or be faced with legal proceedings.

The borrowers replied on l6 August 1989. This document is quite instructive because it amounted to nothing more than a bare denial of any knowledge as to the sale of the property and a request for information of how the debt claimed was calculated. It bears emphasis that these borrowers are English educated and were fully aware of the trouble to which they had put the bankers by their persistent defaults. Their persistent failure to respond to the demand letters of the bank must be held to be an admission that the amounts claimed were in fact due and owing.

The bank filed its action in the Sessions Court at Johor Bahru on 10 September 1989. The borrowers filed a defence in December 1989 and successfully applied to transfer the matter to the Kuala Lumpur Sessions Court in 1990.

The only issue raised in the original defence was that the bank had breached its contractual obligations by releasing the loan to the developer when it should not have done so. In the light of the facts set out earlier this was rubbish, and obviously put in to embarrass the fair trial of the action. The amended defence and counterclaim filed on 25 November 1992 was also questionable because it was now being alleged four years after the event that in selling the house at RM56,000 on 21 September 1988 the bank had acted negligently and without due care.

It is trite law that a party is bound by its pleadings, and that allegations of negligence must be pleaded with particularity. The so-called particulars of negligence pleaded were as follows:

(1) Selling the said property at RM56,000 on 21 September 1988.

(2) Failed to appointed qualified person to obtain the true commercial value of the property.

(3) Failed to do all that is prudent to determine the true commercial value of the said property or the status of the property market.

(4) Failed to notify the defendants of the sale of the said property at the said price of RM56,000 or at all.

Item (1) is not an averment of negligence. Item (3) was equally deficient because the borrowers did not specify what specific action the bank should have taken which would have been prudent, nor did they specify what the result would have been if such action had been taken.

The defence then proceeded to deny any debt to the bank, but if there was any sum owing the borrowers claimed to set off the alleged damages which they suffered by reason of the sale, which damages were the subject of the counterclaim.

At the trial the bank's credit officer having the conduct of the borrowers' account gave evidence on oath for the bank. The documents which the bank relied on were in a bundle of documents which were put in without any objection from the borrowers' solicitors and marked exh. A. Once it was so put in, the defendants were not entitled thereafter to object to their admissibility. The documents made it clear beyond dispute that the borrowers had taken the loan, defaulted in paying any single instalment and failed to reply to the letters of demand of the bank and its solicitors. Then evidence was put in of the valuation reports obtained by the bank, and three abortive public auctions held, followed by the fourth public auction at which there was a successful bidder for RM56,000. The demand notice for the balance due after this sale was also put in which the borrowers did not challenge in terms of the validity of the sale or the balance claimed. In cross - examination the borrowers' solicitors did not challenge that the bank had in fact got a valuation for the reserve price of RM56,000 and that the auction was published in the newspapers. The Bank did not call any other witness.

The first respondent is a manager of a business living in Petaling Jaya and fluent in English. He gave evidence that on 28 September 1988 he wrote to the developer asking for their sale price of their double-storey shophouses. On 5 October 1988 he received a reply to say they were asking RM92,500 for an intermediate lot. Based on this information he contended that the bank should have sold his house for RM90,000-RM100,000.

He did not seek to explain his blatant defaults in paying his instalments. In cross - examination he admitted he was aware of at least one of the public auctions held by the bank. What is obvious is that he took no interest in these auctions. He admitted that in August 1989 he knew the property was going up for auction. But he did absolutely nothing to ensure that the price fetched at the auction should be what he thought the property was worth. The second respondent is his wife, she did not give evidence.

The second witness called by the borrowers was a valuer named Wong Yoon Kong. He was called to put in a valuation report by the firm of Knight Frank

Baillieu dated 2 July 1993, prepared by one Kho Joo Hee, who stated in the report that the basis of his valuation was the open market value which "is the best price at which an interest in a property might reasonably be expected to be sold by private treaty at the date of valuation assuming:

i) a willing seller and a willing buyer dealing at arm's length;

ii) a reasonable period within which to negotiate the sale, taking into account the nature of the property and the state of the market;

iii) value will remain static throughout the period of negotiation for sale;

iv) the property will be freely exposed to the market; and

v) no account is to be taken of an additional bid by a special purchaser.

His valuation was based on the comparison method but the report shows only one comparable sale in June 1985 for RM130,500. It totally ignored the efforts made to sell the property by public auction and gave no information of what the notional value would have been if it had been sold by public auction.

The bank's solicitors objected to the admissibility of this report, and in cross - examination revealed that Wong had not been to the site and had no knowledge of the various abortive public auctions held to dispose of the property before it was sold for RM56,000, and was neither the author of the report or in any way involved in its preparation.

The parties put in writtten submissions and on 14 October 1993 the learned president dismissed the bank's claim with costs and also dismissed the borrowers' counterclaim with costs.

The bank appealed to the High Court. The appeal records before us does not indicate that there was any cross-appeal to the High Court by the borrowers against the dismissal of their counterclaim. All it shows is that after hearing the submissions of Counsel the learned High Court Judge dismissed the bank's appeal, reversed the Sessions Judge on the counterclaim and gave judgment to the borrowers for RM44,000, and costs. The reasoning for this finding was that because the borrowers' valuer thought the property was worth RM100,000, but it was sold at the public auction for RM56,000, the borrowers had suffered damage in the difference of RM44,000 and should therefore be paid this figure!

Quite apart from the fact that this order could simply not be supported by the evidence, the Judge completely overlooked that the borrowers had defaulted in the repayment of their loan which had not been discharged because there was a shortfall for which the borrowers were still liable. The alleged damage suffered by the borrowers was in fact pleaded by way of a set-off against

the claim by the bank for this shortfall still due by way of unpaid balance of principal and interest which stood at RM81,021.89 on 30 August 1989 with interest at 10.75% per anum till realisation.

This is an appropriate juncture for us to revert to the pleadings. The only defence so far as the loan was concerned was that the bank should not have released it to the developer because the borrowers had not given their consent. On the facts and the evidence led this defence was devoid of any merit. The bank officer gave sworn testimony from the bank's records of the amount remaining due after the sale as aforesaid.

The only remaining issue was whether the bank was negligent in selling the property for RM56,000. Once against we must revert to the pleading. Item (2) and (3) of the particulars of negligence was proven to be groundless because the Bank had led evidence to show that it had taken advice from qualified persons before it set the reserve price at each of the public auctions held. Item 4 the particulars of negligence was shown to be groundless because firstly the loan agreement imposed no contractual duty upon the bank to notify the borrowers of the sale, and secondly the first respondent's evidence on oath was to the effect that he knew that he had defaulted and that the Bank had put the property up for auction, and he did nothing about bidding himself at the auction or doing anything whatsoever to get a better price himself, apart from writing to the developer for their prices after the property was sold at the last auction.

The true commercial value of a property is not what an valuer thinks it should be, but the actual price that property will fetch when it is put up for sale in the open market. When there were no bidders at the first four public auctions, all of which were advertised, the only inference possible is that the reserves were too high. At the last auction the reserve was RM56,000. So the only finding possible was that the true market value was RM56,000 because that was all an impartial buyer was prepared to pay for it.

Any finding to the contrary required positive evidence from the borrowers that the auction was fraudulently or so recklessly or negligently conducted that there were genuine buyers who would have come and bid to buy the property at RM100,000 if they had been given an opportunity to do so. No such evidence was called by the borrowers. In actual fact the valuer's report tendered by the respondent's witness was inadmissible because the maker was not called. But even if it was technically admissible the contents did not go to show that the true market value was RM100,000. That was only a retrospective opinion expressed in 1993 with no proper material to support it. It was not evidence that if the property was put up for sale at a public auction there would have been ready buyers for RM100,000.

Consequently the defence allegation of negligence remained only just that i.e. an unproved assertion of a legal conclusion with no facts to support it. Furthermore the damage claimed by the defence had to be proved. Since no person was called to prove that he would have been prepared to pay more than RM56,000 for the property, no damage had been proved by the defence either.

The proper order to make was therefore to allow the bank's claim in full with costs and to dismiss the borrowers' counterclaim with costs. Our decision to do so was unanimous.

These borrowers were living in Petaling Jaya. They bought a shophouse in Kota Tinggi, Johore with money borrowed from the bank. Their conduct until the bank sued them for the shortfall and thereafter makes the inference very much open that they were speculators who had no intention of honouring their business commitments when the market went sour from 1986 onwards. Their original defence and the amended defence and counterclaim show that they were not above resorting to very doubtful legal means to frustrate the bank's efforts at recovery. The fact that they were able to force the bank to come this far to get justice imposes an obligation upon this Court to spell out the law in this area so that such frivolous and vexatious defences are not encouraged.

As YA Edgar Joseph Jr. FCJ said in *Asia Commercial Finance (M) Bhd. & Anor. v. Development and Realtor Sdn. Bhd.* [1992] 2 CLJ 1175; [1992] 2 MLJ 504 at 516

> The issue of the appropriate standard of care owed by the chargee to the chargor is not free from difficulty. One line of authority is to the effect that a mortgagee's only duty is to act *bona fide* in the conduct of the sale (see *Kennedy v. De Trafford; Wamer v. Jacob).* In the latter case, Kay J said at p. 224:
>
> > ... a mortgagee is strictly speaking not a trustee of the power of sale. It is a power given to him for his own benefit, to enable him to better to realise his debt. If he exercises it *bona fide* for that purpose, without corruption or collusion with the purchaser, the Court will not interfere even though the sale be very disadvantageous, unless indeed the price is so low as in itself to be evidence of fraud.
>
> In the case of *Pendlebury v. Colonial Mutual Life Assurance Society Ltd* Isaacs J stated at p. 699 that "so long as [the mortgagee] observed specified formalities and acts in good faith his conduct cannot be challenged".
>
> The opposite line of authority is exemplified by the English Court of Appeal case of *Cuckmere Brick Co. Ltd. v. Mutual Finance Ltd.* where Salmon LJ based the obligation of the mortgagee, not on a standard of behaviour imposed by equity but on a legal duty based on the tort of negligence and stemming from proximity of the mortgagor and the mortgagee. What his Lordship said was this:

> Surely they are 'neighbours'. Given that the power of sale is for the benefit of the mortgagee and that he is entitled to choose the moment to sell which suits him, it would be strange indeed if he were not under legal obligation to take reasonable care to obtain what I call the true market value at the date of the sale.

> In Australia, the controversy as to which test is the appropriate test to apply - the more stringent test laid down in *Cuckmere* setting a higher standard for the mortgagee or the more relaxed test laid down in *Pendlebury* - remains to be resolved by the High Court.
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> I note, however, that in the Hong Kong Privy Council case of *Tse Kwong Lam v. Wong Chit Sen* their Lordships accepted the *Cuckmere* test, I would respectfully do the same.

I have been greatly troubled as to whether it can really be contended that *Cuckmere* really decided that a mortgagee had some open ended duty of care to a mortgagor to get the best possible price for the mortgaged property by expending further energy and financial resources in creating optimum conditions for the sale or whether the mortgagee was entitled to take the line that he was not obliged to throw away good money after bad, but was entitled to take the market as he found it and get the best price he could in the circumstances.

There is a considerable diversity both in language and approach in the judgments of the three Judges who decided *Cuckmere.* The facts show that the mortgagee was guilty of wilful default which in my view amounted to recklessness. So I think the conclusion of Salmon LJ (at p. 968H of the report) should be very cautiously applied in other circumstances. He said this:

> I accordingly conclude, both on principle and authority, that a a mortgagee in exercising his power of sale does owe a duty to take reasonable precautions to obtain the true market value of the mortgaged property at the date on which he decides to sell it. No doubt in deciding whether he has fallen short of that duty the facts must be looked at broadly, and he will not be adjudged to be in default **unless he is plainly on the wrong side of the line**." *(Emphasis added)*

That "the duty to take reasonable precautions" is a narrow one which will not be extended to cover every possible step an altruistic financier could have taken regardless of time, cost, or effort is clearly brought out by what a mortgagor can legally do. See p. 965G of the report where Salmon LJ says:

> I will now turn to the law. It is well settled that a mortgagee is not a trustee of the power of sale for the mortgagor. Once the power has accrued, the mortgagee is entitled to exercise it for his own purposes whenever he chooses to do so. It matters not that the moment may be unpropitious and that by waiting a higher price could be obtained. He has the right to realise his security by turning it

into money when he likes. Nor, in my view, is there anything to prevent a mortgagee from accepting the best bid he can get at an auction, even though the auction is badly attended and the bidding exceptionally low. Providing none of those adverse factors is due to any fault of the mortgagee, he can do as he likes. If the mortgagee's interests, as he sees them, conflict with those of the mortgagor, the mortgagee can give preference to his own interest, which of course he could not do were he a trustee of the power of sale for the mortgagor.

Vinelott contends that the mortgagee's sole obligation to the mortgagor in relation to a sale is to act in good faith; there is no duty of care, and accordingly no question of negligence by the mortgagee in the conduct of the sale can arise. If this contention is correct it follows that even on the facts found by the Judge, the defendants should have succeeded.

It is impossible to pretend that the state of the authorities on this branch of the law is entirely satisfactory. There are some *dicta* which suggest that unless a mortgagee acts in bad faith he is safe. His only obligation to the mortgagor is not to cheat him. There are other dicta which suggest that in addition to the duty of acting in good faith, the mortgagee is under a duty to take reasonable care obtain whatever is the true market value of the mortgaged property at the moment he chooses to sell it: compare, for example, *Kennedy v. De Trafford* [1896] 1 Ch 762; [1897] AC 180 with *Tomlin v. Luce* [1889] 43 Ch. D. 191, 194.

The Mortgage's Duty on Sale by Peter Butt in [1979] 53 ALJ 172 at 175 reads:

This "neighbour" approach has been condemned as a "fusion fallacy", on the ground that, as the interest sold by the mortgagee includes the equity of redemption, any complaint by the mortgagor regarding the manner of exercise of power of sale ought to be made in equity, not at law, and that the approach of the Court of Appeal in the *Cuckmere Brick Co.* case was inappropriate in so far as it "strove to reassess the obligations of the mortgagee in terms drawn from the tort of negligence and treated the remedy as lying in damages." While the criticism is appealing, the apostasy has been too long tolerated to be none decried as heresy.

Indeed in *Brutan Investment Pty. Ltd. v. Underwriting and Insurance Ltd. and Another* [1981-82] 39 ACTR 47 the Supreme Court of the Australian Capital Territory declined to follow *Cuckmere Brick Co. Ltd. v. Mutual Finance Ltd.* [1971] 1 Ch 949 and laid down the duty of a mortgagee in these terms:

The duty of a mortgagee exercising power of sale is to act in good faith, that is, without fraud and without willfully or recklessly sacrificing the interests of the mortgagor. His duty does not require him to take reasonable care to obtain the true market value of the mortgaged property.

I have read all the cases cited or referred to in the decisions I have earlier mentioned, including *Kian Choon Investments (Pte) Ltd. v. Societe Generale & Anor.* [1990] 2 MLJ 74, and *How Seen Ghee v. Development Bank of Singapore* [1994] 1 SLR 526. 1 have noted that wherever the Court has found for the mortgagor it has only been on the basis that there was some deliberate and wilful conduct on the part of the mortgagee in selling for a lower price when he knew that there was another purchaser available who was ready and willing to pay a higher price if the charged property had been made fairly available to him.

Because it is fully in accord with the opinion I have expressed and in view of the great importance of this area of law to Bankers, I now proposed to quote in full what was stated by Lord Templeman in the Privy Council in *Downview Nominees Ltd. v. First City Corporation Ltd.* [1993] 1 NZLR 513 at pp. 524, 525:

> The general duty of care said to be owed by a mortgagee to subsequent emcumbrancers and the mortgagor in negligence is inconsistent with the right of the mortgagee and the duties which the Courts applying equitable principles have imposed on the mortgagee. If a mortgagee enters into possession he is liable to account for rent on the basis of wilful default; he must keep mortgage premises in repair; he is liable for waste. Those duties were imposed to ensure that a mortgagee is diligent in discharging his mortgage and returning the property to the mortgagor. If a mortgagee exerciser his power of sale in good faith for the purposes of protecting his security, he is not liable to the mortgagor even though he might be obtain a higher price and even though the terms regarded as disadvantageous to the mortgagor. *Cuckmere Brick Co. Ltd. v. Mutual Finance Ltd.* [1971] Ch 949 is Court of Appeal authority for the proposition that, if the mortgagee decides to sell, he must take reasonable care to obtain a proper price but is no authority for any wider proposition. A receiver exercising his power of sale also owes the same specific duties as the mortgagee. But that apart, the general duty of a receiver and manager appointed by a debenture holder, as defined by Jenkins LJ in *Re B Johnson & Co. (Builders) Ltd.* at p. 661, leaves no room for the imposition of a general duty to use reasonable care in dealing with the assets of the company. The duties imposed by equity on a mortgagee and on a receiver and manager would be quite unnecessary if there existed a general duty in negligence to take reasonable care in the exercise of powers and to take reasonable care in dealing with the assets of the mortgagor company
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> Richardson J appreciated the contradictions and inconsistencies between the duties of a receiver and manager as set forth by Jenkins LJ based on historical equitable principles and the suggested additional or alternative duty of care based on negligence. Richardson LJ said at p. 276:
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> > The existence, nature and extent of the receiver's duty of care must be measured in relation to the primary objective of the receivership which is

> to enforce the security by recouping the moneys which it secures from the income or assets of the company subject to the security, and for that purpose by exercising incidental powers of managernent, and when recoupment is complete, to hand the remaining property back to the control of the company.

Their Lordships consider that it is not possible to measure a duty of care in relation to a primary objective which is quite inconsistent with that duty of care.

There is a great difference between managing a company for the benefit of a debenture holder and managing a company for the benefit of shareholders. If the debenture holder is dissatisfied with the policy or performance of his appointed receiver and manager, the appointment can be revoked. A dissatisfied second debenture holder may required the prior debenture to be assigned to him or may put the company in liquidation. A dissatisfied company may raise the money to pay off a debenture holder or put the company into liquidation. But if a receiver and manager decides at his discretion to manage and is allowed to manage and does manage in good faith with the object of preserving and realising the assets for the benefit of the debenture holder, he is subject to no further or greater liability.

In the United Kingdom the possible harsh consequences to a company of a receivership may be averted by an administration order under the Insolvency Act 1986. Such an order may be made if the company is or is likely to become insolvent and if the order will be likely to achieve, *inter alia*, the survival of the company or any part of its undertaking as a going concern. A petition for an administration order may be presented by the company or the directors or by a creditor. The order appoints, an administrator to manage the affairs of the company with powers of sale and automatically prevents a receiver from acting and prevents a creditor from enforcing any security without the consent of the administrator or the leave of the Court. The administrator may be removed if the company's affairs are managed by him "in a way which is unfairly prejudicial to the interests" of the company's creditors or members. Similar legislation is in force in the United States. In the absence of any such legislation, the only limitations on the exercise of power by a receiver and manager are the requirements to act in good faith for the purpose of preserving and realising the assets for the benefit of the debenture holder.

The House of Lords has warned against the danger of extending the ambit of negligence so as to supplant or supplement other torts, contractual obligations, statutory duties or equitable rules in relation to every kind of damage including economic loss; see *CBS Songs Ltd.. v. Amstrad Consumer Electronics plc.* [1988] AC 1013 at p. 1059, *Caparo Industries plc. v. Dickman* [1990] 2 AC 605 and *Murphy v. Brentwood District Council* [1991] 1 AC 398. If the defined equitable duties attaching to mortgagees and to receivers and managers appointed by debenture holders are replaced or supplemented by a liability in negligence the result will be confusion and injustice. A receiver and manager liable in negligence will be tempted to sell assets as speedily as possible for the purpose of repaying

> the mortgage debt, a decision which, whether negligent or not, does not expose him to a suit for damages but may be disadvantageous to the company. A receiver who is brave enough to manage will run the risk of being sued if the financial position of the company deteriorates, whether that deterioration be due to imperfect knowledge or bad advice or insufficient time or other circumstances. There will always be expert witnesses ready to testify with the benefit of hindsight that they would have acted differently and fared better.

As for proof of damage it can never be enough for the mortgagor to make a bare assertion that the price was too low even if he calls a valuer to say so because the "true market value" or the "best price" of a property is not what the mortgagor or his valuer thinks it is, because this is evidence of opinion not fact. The highest price a real buyer was willing to pay in the circumstances has to be judicially determined on the basis of relevant evidence. To revert to *Cuckmere* again at p. 981, Cairns LJ said:

> Once the Judge accepted the task of assessing the value he had to do the best he could on inadequate materials but this does not mean that the figure he arrived at his necessarily sustainable. It was for the plaintiffs to prove their case. They called no flat-developer to say he would have offered £65,000 for the land. No doubt if Dann or St. John had been consulted they would have advised paying that price but it may well be that other advisers would have been more cautious or that the developers would have realised how shaky that valuation was and would have refrained from bidding so high. To establish the figure of £65,000 it is necessary to assume the presence at the auction of at least two flat developers who would have bid against each other to push up the price to that extent.

To reinforce what was said by YA Edgar Joseph Jr. FCJ at p. 517 of his decision, on the need to prove that the under value was so gross as to indicate fraud or want of prope standards of care, I would with respect adopt the remarks by Peter Butt at p. 181 of his article. It reads:

> On the other hand, it is also beyond doubt that a mortgagee may not exercise the power of sale in a fraudulent manner. It has been said that the price realised may be so low as to be itself evidence of fraud on the part of the mortgagee, but it is clear from the decided cases that the quantum realised, although relevant, will not normally be conclusive. It is only an exceptionally low price which, per se, conclusively demonstrates fraud (as, for example, where a property worth RM1,600 was sold for 25 cents, one worth RM5,500 was sold for RM50, and one worth between RM13,000 and RM19,000 was sold for RM1,000). Generally, inadequacy of price will need to be coupled with other factors, such as inadequate marketing or knowledge, that another buyer may be prepared to pay a better price, before the sale will be set aside. In any case, the value of real estate is largely a matter of opinion, and it is to be expected that the mortgagor may have an inflated idea of its worth, while the buyer naturally takes a conservative view of the value of what he is buying.

In the present case the bank employed a licensed appraiser to conduct the sale by public auction. As stated in Vol. 32, *Halsbury's Laws of England,* Fourth Edn. at para 729:

> The mortgagee is entitled to employ agents to effect the sale, and so long as he selects agents presumably competent, he is not liable for their errors of judgment, or errors in matters of detail not seriously affecting the success of the sale or the price realised; but if the agent is guilty of a serious blunder inducing a failure to sell, or a large diminution of the price realised, the mortgagee is responsible, although he may have a remedy against his agent.

Hopefully the Courts should not be troubled in future by defaulting borrowers as was done in this case, unless their grievance against the lender is manifestly a legitimate one which the Courts should step in to remedy.

Reported by WA Sharif